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IN THE

Supreme Court of the United States

No.

DAVANNE REALTY COMPANY, VINMAN COMPANY, NEWARK JERSEY COMPANY, CLAYTON HOLDING COMPANY, MONNA, INC., all of the foregoing being corporations of the State of New Jersey; PHILIP MANDELBAUM and ELLA MANDELBAUM, his wife; and ROBERT GOLDBERG and DIANE GOLDBERG, his wife,

Petitioners,

vs.

MAYOR and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONTVILLE,

Respondent,

and

COMMITTEE FOR THE PRESERVATION OF NORTHERN MONTVILLE, INC.,

Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

DAVANNE REALTY COMPANY, VINMAN COMPANY, NEWARK JERSEY COMPANY, CLAYTON HOLDING COMPANY, MONNA, INC., all of the foregoing being corporations of the State of New Jersey; PHILIP MANDELBAUM and ELLA MANDELBAUM, his wife; and ROBERT GOLDBERG and DIANE GOLDBERG, his wife,

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MAYOR and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONTVILLE,

Respondent,

and

COMMITTEE FOR THE PRESERVATION OF NORTHERN MONTVILLE, INC.,

Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI

The petitioners, Davanne Realty Company, *et als.*, respectfully pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of New Jersey and the Opinion and Judgment of the Appellate Division of the Superior Court of New Jersey adopted thereby and entered in this proceeding on May 1, 1979.

OPINIONS BELOW

The Supreme Court of New Jersey denied Petitioners' application for certiorari without opinion. The Opinion of the Appellate Division of the Superior Court of New Jersey, dated February 5, 1979, is appended at Pa1. The Opinion of the Law Division of the Superior Court of New Jersey, dated January 9, 1976, is appended at Pa4.

JURISDICTION

The Judgment of the Supreme Court of New Jersey was entered on May 1, 1979. (A copy of the Judgment is appended as Pa30). By this Judgment the Court denied petitioners application for certiorari and left standing the Opinion and Judgment of the Appellate Division aforesaid. The Appellate Division's determination permitted the Law Division's Order of February 25, 1976 and Judgment of May 10, 1976 to remain in full force and effect without modification. (The former is reproduced as Pa31 and the latter as Pa34.)

An application for an extension of the time in which to file this petition was filed on or about July 19, 1979, within the ninety day period from May 1, 1979, permitted for the filing of this petition. On July 24, 1979, the Honorable William J. Brennan executed an Order Extending Time to File For Writ Of Certiorari to and including September 13, 1979. This petition is filed within the period provided by said Order.

The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the re-zoning of petitioners lands rendering them "virtually valueless" constitute a "taking" without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Was the harm to petitioners as a result of the re-zoning so unduly harsh as to deprive them of substantive due process of law in violation of the Fourteenth Amendment in view of the doubtful public purposes served and the availability of more reasonable means to implement the public policies?

STATEMENT OF THE CASE

On September 3, 1974, petitioners duly filed their Complaint in this matter in the Law Division of the Superior Court of New Jersey. The Complaint alleged that the re-zoning of a large tract of 586 acres owned by petitioners by the Township of Montville, Morris County, New Jersey, was arbitrary and unreasonable and, among other transgressions of law, constituted a taking without just compensation in violation of their rights as guaranteed under the Fifth and Fourteenth Amendment of the United States Constitution. This position was articulated in the pretrial order and argued in petitioners' briefs below including their brief on appeal and their petition for certification to the New Jersey Supreme Court.

The act complained of was the passage of a zoning ordinance by the Township Committee of the Township of Montville which removed petitioners' property from the A-2 zone and placed it in a newly created and drastically more restrictive A-1 zone. The minimum lot size was in-

creased from 45,000 square feet (hereafter described as one acre, although one acre is more accurately 43,560 square feet) to 120,000 square feet (called for convenience three acres) rendering the tract unusable as zoned. Although petitioners voiced their objections to the destructive effect of this requirement by petition in May of 1974, and at the public hearing in July of that year, the Township Committee enacted the ordinance on July 18, 1974.

On November 27, 1974, the Committee for the Preservation of Northern Montville (hereinafter CPNM) moved to intervene as a party defendant, which motion was granted. Petitioners moved to appeal the order in the Appellate Division, which motion was denied on February 7, 1975.

At the pretrial conference on March 21, 1975, the Court ordered that the proceedings be bifurcated to deal separately with issues pertaining to the particular site as Phase I and the challenge to Montville's zoning under *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) as Phase II.

Phase I of the trial, concerned primarily with confiscatory and comprehensive planning aspects of the amended zoning ordinance, commenced on September 26, 1975. The trial proceedings spanned nineteen days from September 26, 1975 to November 13, 1975, and are recorded in 2,108 pages of transcript. By Order dated February 25, 1976, the Court invalidated certain technical aspects of the cluster provision of the A-1 zoning, but indicated that the ordinance could be corrected if an appropriate amendment were enacted within 90 days.

On April 14, 1976, the Court heard argument on Phase II of the matter. On May 10, 1976, the Court, finding that the requirements announced in *Mt. Laurel* applied to

Montville, ordered that the Township complete its master plan study and enact implementing ordinances to comply with the *Mt. Laurel* decision, *supra*, by January 31, 1977. Montville did not appeal this determination by the trial court.

Petitioners filed a Notice of Appeal in the Appellate Division of the Superior Court of New Jersey on May 21, 1976. They appealed from the Order of February 25, 1976 which generally sustained the A-1 (three acre density) zone and from those aspects of the Judgment of May 10, 1976 that failed to require Montville to fulfill its fair share of the needs for low and moderate income housing in the region.

Initially, the Appellate Division dismissed the appeal upon the motion of the defendants. Pursuant to petitioners' application, however, the New Jersey Supreme Court reinstated the matter remanding it to the appellate court. In their brief and argument on appeal, petitioners continued to press their claim that the zoning deprived them of their rights to substantive due process under the United States Constitution. On February 5, 1979, the Appellate Division issued its *per curiam* Opinion, affirming the determination of the trial court.

On February 21, 1979, within the time period provided by law, petitioners filed a Petition for Certification to the New Jersey Supreme Court. In their petition, they posed a single question:

> The issue, now before the court for the first time with a clear, established record, is simple: Is an ordinance which imposes extreme lot size requirements, effectively prohibiting development for one fifth of a sprawling township, sustainable under the new Municipal Land Use Law, the United States Constitution and the Constitution of the State of New Jersey.

On May 1, 1979, petitioners' Petition for Certification to the New Jersey Supreme Court was denied without opinion. On July 19, 1979, within the period permitted by the rules, petitioners made application to the United States Supreme Court, addressed to the Honorable William J. Brennan, Jr., for an extension of time to file this Petition. On July 24, 1979, Justice Brennan executed an Order Extending Time to File Petition for Writ of Certiorari to and including September 13, 1979.

STATEMENT OF FACTS

Petitioners own 586 acres of land on the A-1 zone in Montville Township. In 1971, under the original one acre zoning prevailing prior to the adoption of the three acre zoning complained of in this litigation, petitioners obtained preliminary approval for a subdivision consisting of ninety lots on part of their land entitled "Mountainview Estates" (T14-2, 9/26/75). David Mandelbaum, appearing for the petitioners, testified to the extensive difficulties in marketing the one acre lot subdivision, describing newspaper advertising in *The Newark Star-Ledger* and *The New York Times*, listing with an active broker in Montville and reduction of the asking price to $3,000.00 a lot (*Id.*, T18-10 to 19-25). He emphasized the practical limitations presented by the one acre zoning much less the extreme disability imposed on the tract by three acre zoning (*Id.*, T19-19).

On July 18, 1974, however, the Township, in the words of its municipal planner, Robert J. O'Grady of Robert Catlin Associates, initiated "a very significant departure" from its zoning policy (Dep., T22-1). It reduced to an unprecedented low density the uses permitted in four

square miles of lands in northern Montville, and did so without any review of its master plan or of its overall zoning ordinances (*Id.*, T118-1).

The new ordinance (referred to as the "A-1 Ordinance") reduced the permissible density of development on petitioners' lands and much of northern Montville by approximately two-thirds. In the area west of Boonton Avenue, it reduced the permissible density by one-third (80,000 square-foot minimum lot size to 120,000 square-foot minimum lot).

The A-1 Ordinance provided a "cluster" alternative, if reduction to one acre lots, a very large size, can be considered "cluster." This permitted construction of single family detached dwellings on one acre lots as long as approximately two acres (for each one acre) of the most usable land were turned over to the Township. Because the trial court found this provision to be unreasonable, not as to the density but as to other features of the original ordinance, it has been revised to provide that cluster be allowed on seven acre minimum tracts; that the density be greater than that which could be achieved with 120,000 square foot lots; that the minimum lot size be 45,000 square feet, and that the remaining land either be dedicated as "undeveloped open space" or "conservation of environmentally sensitive features" or be utilized for school or recreational uses. This revised A-1 ordinance only authorizes "cluster" if "mutually agreeable" to the developer and the Township Planning Board and provides no standards to guide the Planning Board in giving its consent.

Consequently, where in 1975, petitioners had been faced with the great difficulties imposed by one acre zoning under the old ordinance, petitioners were now confronted with requirements three times more restrictive, limitations so drastic as to remove any vestige of doubt regarding potential developability.

At trial, one of New Jersey's most widely respected civil engineers, John Aurnhammer, testified to an itemized analysis of land development costs which he prepared with respect to petitioners' property (T29-2 *et seq.*, 10/2/75). According to Aurnhammer, the development cost per lot under the three acre zoning was approximately $25,000 (exclusive of the cost of the land and the attendant indispensable carrying charges) (*Id.*, T35-1). Even with the use of the so-called cluster provision, costs would be reduced by only about $3,000 per lot (*Id.*, T35-12).

Aurnhammer, from his experience as an engineer for numerous developers and John Lasser, an expert real estate appraisor, both testified in detail to the zoning requirements as the cause of these excessive costs which each concluded would render development for single family homes, using either alternative, impossible under current market conditions.

Based on the Aurnhammer cost analysis, Lasser demonstrated on the record of all sales in the Township during the most recent three years, that the market for homes in the price range required by the excessive development costs *for the entire Township* would be seven or eight homes per year on the average. "Based upon my research and my estimates of the market," Lasser testified, "it's my opinion that the property is virtually valueless with this kind of zoning because of the unusual development costs that are necessary for the site" (T26-14, 10/2/75).

Mary Winder, a planner, testified to examining the records at Township Hall. She found no housing developments at a three acre density anywhere in the Township, only one house constructed on three acres since 1965, and a total of only five houses built on three acre lots since World War II (T135-11, 10/1/75).

Defendants did not seriously challenge the cost analyses by cross-examination, or the conclusions drawn from them. No testimony was introduced by either defendant on the issue of feasibility to refute this testimony other than a general statement by O'Grady, devoid of any supporting evidence or data, that he believed some development was feasible.

In addition to the economic analysis just described, petitioners presented evidence demonstrating that the three acre zoning was derived and accepted from two sources, neither of which provided any rational basis for it.

Originally, a three acre zoning restriction was proposed by the intervenor, CPNM, a group of residents primarily living in and around Lake Valhalla, a mile or two south of petitioners' property (T589-3, 10/23/75). Its principal concern was the protection of the home environment around the lake. The stated goal of its proposal, as the testimony of CPNM president Hallie Connolly showed, was to halt development in the area in order to provide the Township with an opportunity to make studies and surveys. In making its recommendation, the Committee was fully aware that development of a subdivision with the three acre lots required by their proposal was, in Connolly's words, "ridiculous." Connolly testified that she did not anticipate that the suggestion for an "interim ordinance" would be translated, as it was, into a permanent three acre requirement effectively banning all new construction (T50-15, 11/12/75).

The second source for establishing the three acre zoning was a telephone conversation between the Township planner and the State geologist, Joseph W. Miller, Jr. Township Planner O'Grady had called him and described the northern Montville area in geological terms as Pre-

cambrian Gneiss. (Much of northern New Jersey is on lands once covered by a glacier. Consequently, these lands, embracing northern Montville and tens of thousands of acres extending far beyond the borders of the State, are underlaid by a gneiss rock formed in precambrian times). Miller told O'Grady then, and repeated at trial, that this Precambrian gneiss contained within it a moderate supply of water that could support from the land itself without resort to the Township's water supply a population of only approximately two hundred families for each square mile (T50-21 to 54-7, 10/29/75). This translates to approximately three acre density [there being 640 acres to a square mile]. Miller referred only to water supply and he made no pretense to any expertise in sanitary waste disposal. Thus, limiting the use of the site to the extremely low density population that could be supported by the on-site water supply was the genesis of O'Grady's proposal for upgrading the applicable density requirements on petitioners' land from one to three acres.

Even at the time of deposition, long after his recommendations were embodied in the local ordinance, O'Grady still believed that petitioners' tract was dependent on on-site water derived from the underlying precambrian gneiss rock. It was not until cross-examination at trial that he finally recognized that the municipal water system extends into this very A-1 Zone (T134-23 and 135-20, 10/16/75) and was and is available within one-half mile of petitioners' site. Petitioners' engineer testified without contradiction to the feasibility of utilizing the Township's water supply. The supply is currently only at one-third of capacity, so it is more than sufficient (T178-24, 10/30/75). The trial court, despite its conclusions, acknowledged that municipal water was available on site. Yet, the initial ground and a principal reason cited to justify the extreme low density was the opinion of the State geologist as repeated by

O'Grady which assumed total dependency on on-site well water.

O'Grady articulated other reasons, drawn together after the original determination, for large lot, low density zoning. He assumed that development would require septic systems (Dep. T60-18 to 62-13). At deposition he stated he never gave any thought to any other alternative method of sanitary sewer disposal (*Id.*). He assumed without making any inquiry that the Montville Utility Authority (hereinafter, MUA) would not be extending sewer facilities into northern Montville (*Id.*, 61-15; T423-12, 10/22/75). At his deposition, Carl E. Denzler, the Authority's engineer, described plans pending before the New Jersey Department of Environmental Protection and grant applications to the Federal government and State of New Jersey which would extend the interceptor sewer system in northern Montville around Lake Valhalla (Dep. T56-16). These proposed extension lines were delineated by Denzler on Exhibit P-10. The MUA was actively pursuing the alternative. Yet, the Township officials confined their thinking to a type of zoning that would compel the use of septic systems and preclude any other system of waste disposal. This was done at a time when the Township's own health ordinance, apparently recognizing the septic problem in Montville, mandated the use of a central sanitary sewer system for subdivisons of twenty lots or more.

At trial, petitioners presented expert engineering testimony and exhibits on the use of a package-treatment spray irrigation facility which would be feasible for a more dense form of development (T155-25, 10/1/75). This example, posed as a practical alternative to spread zoning on large lots, called for a more concentrated residential development of townhouses, with dedication in perpetuity of other parts of the tract in its undeveloped state. Much trial time

was consumed on the merits, strengths and weaknesses (by way of defense) of this alternative. It was presented in support of the vitally important consideration that extreme low density zoning mandates septic systems and precludes every other form of sanitary disposal.

When asked at deposition whether the low density three acre zoning would be warranted if development were not dependent on well water and septic systems, Township planner O'Grady admitted that he would have reached a different conclusion as to the lot size requirement. Similarly, when asked his view if the development were served by municipal water, Miller replied that if that were the case the three acre lot size no longer applied. In short, the principal bases for three acre lots were false assumptions.

Although the justification for the extreme large lot zoning had its genesis in the presumed unavailability of municipal water and then the dependency on septic systems, O'Grady sought further sustenance on three other grounds: existence of some steep slopes, soil conditions, and accessibility to municipal facilities. Petitioners will briefly discuss each of these rationales as none justifies the penalty inflicted on petitioners of having their property zoned into disuse.

With respect to the slopes, O'Grady stated that his concern began with slopes of 15% or greater (T105-18 to 107-3, 10/16/75). CPNM witness Connolly, calculated that 11.05% of the land had a slope of 15% to 25% (described as "moderately steep" (T8-7, 11/12/75), and an additional 16.41% had slopes in excess of 25% (described as "steep," *Id.*, T8-10). According to defendant's own witness, 72.54% of the land area on petitioners' tract was characterized as having only gentle or moderate grades. (*See* Exhibit DI-8 at 63, T127-3, 10/16/75).

No one suggested that lands with grades in excess of 15% were unbuildable (T189-8, 10/16/75), rather it was felt that development on the steeper slopes and certainly the steepest slopes was more expensive and should be avoided (*Id.*). If the Township's concern were to regulate or even prohibit construction on steep slopes it might have done so. Montville Mayor Frederick E. Eckhardt admitted that a slope ordinance was never considered (T443-1, 10/22/75).

With no grade problem on three quarters of petitioners' tract, with no effort to tailor the use of lands with steep slopes to the problems presented, Montville chose instead to enact excessively severe stop-development zoning restrictions for an area of four square miles.

As to soil conditions, O'Grady prepared and the parties stipulated in evidence a series of maps showing the prevalence of certain soil characteristics. On cross-examination, O'Grady readily acknowledged that "severe conditions" prevailed throughout the entire Township (T197-15, 10/16/75). In fact, of the land in Morris County, 56.8% or some 120,000 acres was classified as having severe limitations for construction of light buildings with basements (single family homes, town houses, garden-type construction). O'Grady also admitted that soil restrictions were less than the definitive prohibiting factor originally put forward by the Township. Rather, "severe", according to O'Grady, on cross-examination meant "a warning signal that there are going to be difficulties in developing certain lands and that in developing them, we should take the necessary precautions or steps to overcome that severity" (T189-12 to 189-19, 10/16/75). Nothing in the record

related the term "severe" to low density, extreme large lot zoning as an exercise of the police power.

O'Grady further testified that in mapping the areas with "severe limitations" he did not distinguish between those that "are of a public concern versus those that are of a private concern". He mixed them together (T191-15, 10/16/75). Time and time again on cross-examination, counsel asked the Planner to state the specific characteristics which he claimed were more prevalent in northern Montville and supported his "soils" justification for low density zoning (T191-10; 202-24; 207-1, 10/16/75). Finally, the following was elicited (*Id.* T206-13):

> "Now I want to know what it is about the soils that exist in such high degree in North Montville to support a distinction of three acre zoning as against one-half zoning elsewhere."

Opposing counsel interjected (*Id.*, T206-17):

> "He answered that 17 times, that it is not just soil. It's other factors."

O'Grady was simply unable to provide any support for the glib statement originally provided the Planning Board that soil conditions justified low density zoning.

As a final make-weight justification, O'Grady suggested that the three acre stop-all-development zoning was needed because northern Montville is remote from the police station and public schools and the roads are narrow and winding. Ironically, the overriding planning consideration affecting northern Montville is Interstate I-287 which passes through Montville within three miles of the A-1 Zone, and when completed will connect with the New York Thruway as part of the national interstate highway system (T224-12, 10/16/75). Within two miles of the A-1 Zone

are commuter railroad stations at Towaco (*Id.*, T223-20) and in Boonton (*Id.*, T223-23 to 224-1). From northern Montville it is less than thirty miles to New York City, Newark and Paterson. Any suggestion of remoteness belies the facts.

Much of the support for non-development zoning emanated from the residents of the Lake Valhalla section immediately south of the A-1 Zone. This area has been one of the fastest growing sections of the Township. Parts of it are zoned to anticipate non-residential growth. Immediately east of the A-1 Zone in northern Montville is one of the Township's industrial areas, classified D-1, with another immediately to the west of the A-1 Zone. Boonton Avenue, designated in the master plan as a "Major Road", County Road 511, transects the westerly portion of the A-1 Zone in a north-south direction and Stoney Bridge Road does the same about a mile and one-half to the east, and although needing improvement, this road serves the easterly portion of the area. In sum, while road improvements unquestionably will be necessary as northern Montville develops, they hardly warrant imposing a building ban on the entire four square mile area.

The CPNM sought to supplement the Township's reasons for large lot zoning with various environmental arguments. Little was added to the slope and soil contentions previously discussed. Essentially, the approach was that development, any development, increases the possibility of run-off, non-point pollution and flooding and that the people already in residence around Lake Valhalla might be subject to significant development in the four square miles of northern Montville. While petitioners anticipate the necessity of showing at the time of subdivision or site plan approval that reasonable standards as to drainage, protec-

tion against erosion and pollution must be met, this hardly calls for the drastic solution proposed here: stopping all development in the area and rendering petitioners' land economically useless. Rather, New Jersey's Municipal Land Use Law makes ample provision for this type of protection as part of subdivision and site plan review (N.J.S. 40:55D-38 and 39). It cannot be used as it is here as a threshold prohibition depriving an applicant of the right to show by proper engineering and design techniques that these concerns can be satisfied.

REASONS FOR GRANTING THE WRIT

The total destruction of the economic worth of petitioners' property for purposes of doubtful public benefit which could be effectively achieved by more temperate and reasonable means deprives petitioners of their property without just compensation in violation of the Fifth and Fourteenth Amendments and in violation of their Fourteenth Amendment right to due process of law.

Petitioners come to this Court because they find themselves losing the use and benefit of a substantial amount of real property as the result of actions by a Township that appear on their face to be patently impermissible under the decisions of the Court. As discussed in the "Statement of Facts," *supra*, the Township's three acre zoning renders petitioners' land economically undevelopable. The only announced public purposes for the zoning, however, do not even remotely mandate the approach taken by the Township or the unduly harsh result with respect to petitioners.

In short, the Township planner was concerned that well water under the land could only support the light population density that such zoning would ensure. He failed to realize, however, that an enormous supply of off-site water was available only one-half mile away. He had assumed in his zoning recommendation that septic systems would be utilized, but was unaware that the Montville Utility Authority was presently developing an extension of their sewer lines into the area even without the impetus that would be created by building on the land. Nor had he considered the use of a package-treatment spray system appropriate for locations where septic systems are not desirable. His subsequent medley of additional reasons for the zoning—slopes, soil and accessibility

to public facilities—were even less credible as detailed in the "Statement of Facts."

This was not an instance where the Township's reasons for its restrictions were founded on broad considerations relating to the quality of life or the preservation of a desirable aesthetic character of a community, *see New Orleans v. Dukes*, 427 U.S. 297 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Indeed, the CPNM found it necessary to intervene in the litigation as a party so that its more general environmental viewpoint might be taken into account. It soon found itself, however, either parroting the bogus notions of the Township planner or maintaining that any development at all might be detrimental as a potential cause of pollution or drainage problems. As noted, *supra*. New Jersey does have specific legislation that controls development in order to ensure that these kinds of environmental abuses will not occur.

The Fifth Amendment to the Constitution contains the injunction "nor shall private property be taken for public use, without just compensation." Petitioners contend that the Township's rezoning of their property constitutes a taking for purposes of the Fifth Amendment.

This Court has long regarded government regulation that works a sufficiently onerous burden on a property owner as constituting a taking which constitutionally requires compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In considering whether the governmental limitations rise to the level of a taking, no set formula has been adopted although a comparison of values before and after is relevant. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). As Justice Holmes wrote for the Court in *Pennsylvania Coal*, *supra* at 413, the police power "must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution."

Petitioners contend that in the case under review any value test must result in the finding of a taking. The record below clearly establishes that their land has been rendered "virtually valueless." *See* "Statement of Facts," *supra*, at 8-9. Petitioners are not bemoaning their inability to choose the most beneficial use; they are challenging regulations that render any permitted use economically disastrous and unthinkable.

The Court has indicated, however, that it will make a further inquiry beyond the bare question of value. This next consideration will be a determination of whether the public encroachment upon private interests constitutes a reasonable exercise of the police power. The classic and widely cited statement of this rule is drawn from *Lawton v. Steele*, 152 U.S. 133, 137 (1894):

> To justify the state . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Observing that even the time honored *Lawton* rule cannot be applied "with strict precision," the Court reaffirmed its adherence to it in *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590, 594-95 (1962). Petitioners submit that upon the trial of this matter, they have plainly met their burden of establishing the unreasonableness of the subject zoning regulation under the *Lawton* standard. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

First, the facts in evidence not only fail to show that the interests of the public do not require the interference with petitioners' property, they manifestly demonstrate the contrary. The Township's justifications for this police power exercise—lack of water, objections to septic sys-

tems, moderately steep slopes on one-third of the land, soil conditions that would increase construction costs and accessibility to public facilities (trains, schools, firehouse, etc.)—are totally without merit. Petitioners do not question the Township's legitimate interest in ensuring that its residents have adequate water or even in deciding that they should not use septic systems. Its "stop development" approach, however, uses an atomic bomb to knock down a footbridge. The concern about slopes and soil seems still more obscure in this context. These are truly only construction impediments which exact a cost from the developer and are already subject to strict governmental supervision and approval under existing law. N.J.S. 4:24-39; N.J.S. 40:55D-38, 39.

Finally, as to accessibility, petitioners have advanced their factual contentions, *supra*, disputing the Township's assessment of the remoteness of petitioners' land (*e.g.s.*, the two rail stations only two miles away; the major interstate highway coming through). Moreover, it is unlawful for a New Jersey municipality to use its zoning power to avoid its responsibility for providing appropriate roads and necessary municipal services. *Mt. Laurel, supra*, 67 N.J. at 186, 336 A.2d at 731; *Schere v. Township of Freehold*, 119 N.J. Super. 433, 436; 292 A.2d 35, 37 (App. Div. 1972). Rejecting a township's argument for minimum four-acre lot size zoning, the Supreme Court of Pennsylvania recently observed, "Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." *National Land and Investment Company v. Kohn*, 215 A.2d 597, 610 (Sup. Ct. 1965).

Hence, the Township's purposes for its zoning cannot be fairly said to be required by the public interest under the first test in *Lawton*. In addition, its zoning restrictions can hardly be found as "reasonably necessary" to accomplish the purposes involved and "not unduly oppressive upon individuals." *Lawton, supra*, at 137. Petitioners have already demonstrated how this zoning renders their property unusable and how it effectuates a drastically overbroad solution—the halting of all development—to address relatively minor construction and site development problems.

In *Pennsylvania Coal, supra*, 260 U.S. at 415, the Court observed that when the seemingly absolute protection of the Fifth Amendment is found to be qualified by the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." The Court then restated the general rule which governs such matters, "If regulation goes too far it will be recognized as a taking." *Id.*

Reviewing the question of whether New York City could place certain restrictions on the use of the Grand Central Terminal property pursuant to its landmark ordinance without effecting a taking, the Court has recently reiterated the applicable constitutional standards to be applied. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In the opening pages of its Opinion in *Penn Central*, at 107-16, the Court gave considerable attention to the significance of the public purposes involved—preserving historic accomplishments, fostering civic pride, supporting business and tourism, etc. Likewise, it emphasized the reasonableness of the city's laws in accomplishing these purposes. Such factors are noticeably absent in the instant case as aforesaid.

Again in *Penn Central*, this Court reaffirmed the continuing applicability of the principles articulated in *Goldblatt* and *Pennsylvania Coal* as discussed herein. *Id.* at 127. Accordingly, the Court considered the economic effects of

the regulations in *Penn Central* and found that all parties conceded that the terminal could yield a "reasonable return" with the limitations imposed. *Id.* at 129. It also noted that "the transferable development rights afforded appellants by virtue of the terminal's designation as a landmark are valuable." *Id.* This contrasts markedly with the case at bar where petitioners do not have the ability to realize any return under the current zoning. They have no economically viable development rights on their property; they have no transferable development rights, and they have no compensation for these losses. Their property has been locked up by these zoning provisions just as surely as if it had been subject to a physical invasion by the Township. *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1331 (9th Cir. 1977).

In short, by every measure traditionally applied to such cases by this Court, petitioners' property has been the subject of a taking without the compensation required by the Fifth Amendment. Unless this Court now acts with respect to petitioners' loss, their constitutional right will become merely a right without a remedy and they will be left without redress with respect to a very real and serious wrong.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRACH, EICHLER, ROSENBERG, SILVER, BERNSTEIN and HAMMER, P.A.,
Attorneys for Petitioners

/s/ William L. Brach
WILLIAM L. BRACH

APPENDIX

OPINION AND JUDGMENT DATED FEBRUARY 5, 1979

Argued January 17, 1979—Decided February 5, 1979.

Before Judges Matthews, Kole and Milmed.

On appeal from the Superior Court, Law Division, Morris County.

Mr. William L. Brach argued the cause for appellants (Messrs. Brach, Eichler, Rosenberg & Silver, attorneys; Mr. William L. Brach and Mr. William H. Eaton on the briefs).

Mr. Lawrence K. Eismeier argued the cause for respondent Township of Montville (Messrs. Eismeier & Falcon, attorneys).

Mr. Nicholas Conover English argued the cause for respondent Committee for the Preservation of Northern Montville, Inc. (Messrs. McCarter & English, attorneys).

PER CURIAM

Plaintiffs appeal from judgments relating to the zoning ordinance, and an amendment thereto of the Township of Montville.

On July 18, 1974 the Township Committee of the Township of Montville enacted an amendment to the township zoning ordinance, rezoning approximately 2400 acres of land in the northern section of the township. The minimum lot size was increased from 45,000 square feet (approximately one acre) to 120,000 square feet (approximately three acres).

Plaintiffs instituted this action challenging the zoning amendment and seeking to have the entire zoning ordinance declared invalid due to its failure to provide for multi-family housing.

At the pretrial conference, the trial judge bifurcated the issues in the case, at the request of the township, and determined that the case would proceed first on the issue of the validity of the 1974 zoning amendment. The challenge to the entire zoning ordinance, referred to as Phase II or the *Mount Laurel* phase, was to be considered after Phase I.

Trial of the matter commenced on September 26, 1975 and continued for nineteen days, ending on November 13, 1975. On January 9, 1976, the trial judge rendered an oral opinion which invalidated certain aspects of the cluster provisions of the three-acre zoning amendment. However, he indicated that the amendment could be sustained if a more reasonable cluster alternative was enacted within 90 days. The township thereafter amended the cluster provisions.

On April 14, 1976 the trial judge heard argument on Phase II of the case. He found that the Township of Montville is a "developing municipality" as that term is used in *Mount Laurel*. He ordered the municipality to complete its master plan study and enact implementing ordinances to comply with the Mount Laurel decision by January 31, 1977.

Plaintiffs filed a notice of appeal on May 21, 1976. Since that time they have been provided with the master plan study as completed to date and a copy of the revised zoning ordinance.

We affirm the two judgments of the law division substantially for the reasons set forth by Judge Gascoyne in his two opinions. In so doing we emphasize that we will not fault the legislative judgment of the township's governing body which determines that the northern section of the township cannot sustain high density use at this time.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin
Clerk

OPINION DATED JANUARY 9, 1976

BEFORE: HONORABLE JACQUES H. GASCOYNE, J.C.C. t/a

APPEARANCES:

MESSRS. BRACH, EICHLER, ROSENBERG & SILVER
By: WILLIAM L. BRACH, ESQ.,
Attorneys for the Plaintiffs

MESSRS. YOUNG & SEARS
By: LAWRENCE K. EISMEIER, ESQ.,
Attorneys for Twp. of Montville

MESSRS. McCARTER & ENGLISH
By: NICHOLAS C. ENGLISH, ESQ.,
Attorneys for Intervenor

PATRICIA BOSISIO, C.S.R.

THE COURT: Before we get into the opinion question, I think that Mrs. Vienna has been in contact with you with reference to what we thought were missing exhibits. One is actually still a missing exhibit, J-18 B. Very candidly, I don't know what happened to it. I requested that all of you be asked to go through your file to see if it's in your file. I gather that you've all complied with the Court's request and it cannot be located. I understand that Mr. English has an additional copy. Is there any objection, since all exhibits will be returned to respective counsel, if J-18B, a copy of Mr. O'Grady's report entitled Natural Environment, be marked into evidence as a joint exhibit and be substituted for the missing exhibit?

I haven't the foggiest idea what happened to it. All I can say is I think we're very, very lucky we didn't lose more in view of the number of exhibits.

(Exhibit J-18 B is marked.)

THE COURT: As far as this matter is concerned it comes on before the Court for a review of an amendment to the zoning ordinance for the Municipality of the Township of Montville. It would appear that there is no dispute that prior to the enactment of the amendment on July 18th, 1974, 2400 acres in the northern part of Montville were in the A1 or 2 zones; that on July 18th, 1974, there was an amendment to the ordinance by which these 2400 acres were placed into an A1 zone that calls for 124,000 square feet. From here on in I will refer to that as a 3 acre zone. Where I have 45,000 square feet I will refer to that as a 1 acre zone just for the purposes of simplicity.

The proofs before the Court and these are not contradicted that the plaintiffs herein, over a period of years, accumulated the various properties. Until presently the various corporations owned approximately 380 acres in the northern section of Montville. Mr. Mandelbaum, on behalf of the plaintiffs and as a principal in the various corporations, testified with respect to the difficulty in dispossessing—I should say dispossessing by way of sale these various lands. He testified that over a period of years that one of the properties was sold to the Croation Society. He also testified with respect to a 90 lot subdivision known as Mountainview Estates, which was proved by way of a preliminary subdivision in 1971. Basically, his testimony concerned efforts on behalf of the various plaintiffs to sell the properties with the argument that the Court should infer that due to the inability to sell these lands that this is a basis for inferring the unreasonableness of the zoning. Additionally, testimony was presented by way of the testimony of Mr. Jeske and Mr. Aurnhammer. Basically, their testimony involved a subdivision of what has been referred to as the Monna tract which, as I recall, is 380 acres plus. If I recall accurately it's 386 acres.

I want to hasten to point out 2 things very, very quickly. One; the purpose of this law suit was not to review a denial of a subdivision application. I further want to emphasize that the sole purpose pursuant to the Court's rulings with respect to this proposed subdivision which was to show a viable alternative. The Court should feel that the increase in the acreage by way of the zoning amendment was unreasonable. I felt that the Court should have available to it all necessary information in order to determine the reasonableness of the zoning in question. I think I would be less than candid that the fact that 2400 acres which represents, according to the testimony, 19 per cent of the land within the Municipality of Montville, putting that within a 3 acre zone, did and does disturb me. I don't want to infer that I feel that 3 acres zoning per se is unreasonable. However, I think that when you have this large quantity of acreage placed in a low density zone such as a 3 acre zone, the Court should have available to it every piece of information from which it can glean whether or not this zoning is reasonable. This is also one of the reasons that I admitted a great deal of testimony on the other side which I had my doubts about, but I feel again that testimony with reference to experience in the Lake Valhalla area by way of siltage erosion, by way of pollution, by way of testimony as to the same nature of rock formation, of soil formation, should be made available to this Court to sift and determine with respect to reasonableness. I want to emphasize that as far as this Court is concerned these 2 facets of the evidence were basically for the purposes of this opinion as it is going to turn out, for informational purposes. As far as this particular area is concerned the testimony is undisputed. That basically it is a steep slope area, there are exceptions to this. However, I am satisfied by the testimony that the slopes located generally within this area are all of a steep nature or basically of a steep nature. There are other variations. There is no question in my mind that

there are areas where slopes would not be detrimental to the development of the land. As far as this 2400 acres I am fully satisfied that basically it is on Precambrian gneiss according to the proofs before me. I am further satisfied that because of the topography herein that there is a tendency for drainage to run from north to south, from this area downward, the Lake Valhalla area towards central and southerly Montville.

I am further satisfied as a result of a review of all the testimony and I accept the testimony offered by the defendant and the defendant Intervenor and I'll refer to the defendant Intervenor as the C.P.N.M., that's the Committee for the Preservation of Northern Montville, that this area does serve as a drainage basin for the Valhalla area and further that I am satisfied that by definition that it constitutes a head water. As I understand head water area it is generally composed of smaller streams as distinguished from larger streams and forms a source of water for various areas within the environs thereof.

I am further satisfied that as far as topography is concerned there are outcroppings. I am further satisfied that there are various wetlands within this area. Further, I am satisfied by the proofs before me that as far as road accessibility is concerned this area is generally not easily accessible. I don't say it's inaccessible. I say it's not easily accessible. There is testimony before me by Mr. Abeles with reference to remoteness. As far as I'm concerned inaccessibility may be one of the considerations that go into zoning. Remoteness is not and I draw a distinction between accessibility and remoteness. The reason I draw a distinction between the two is that remoteness, in and of itself, does not mean that the area is not accessible by the various services that must be supplied by the municipality and when I say services that must be supplied I am talking

about such things as school busing, and this is not by way of limitation but just by way of illustration, school busing, police protection, fire protection, accessibility for the purposes of first aid squads and any other emergency situation. I am satisfied that the road within the area do not make this area easily accessible.

As far as water and sewage is concerned I draw a distinction between the two and the reason that I am taking these in this order are these are various factors that were offered to me by the municipality as a valid basis or valid bases for purposes of zoning. First, water. One of the considerations offered by the municipality is that there is no water presently available. It was stipulated that as between the plaintiff and the M.U.A. that there are no negotiations presently underway with respect to water. To me that is of no moment. The only important thing to me with respect to water is it's availability and I don't mean this in the sense of pollution. I'm now talking solely about supplying water for the domestic needs and the fire needs or anything of that nature. As far as the 2400 acres, in general, I'm satisfied that it is not easily accessible. As far as the plaintiff's tract is concerned I'm satisfied that it can be made accessible. So that the reason I point out the distinctions is that while this may have been a factor, a reasonable factor to take into consideration with respect to the other acreage, I feel that as far as the plaintiff's acreage there should have been a distinction, a distinction should have been drawn as far as water is concerned.

As far as the availability of a sewer system is concerned I am convinced that at this point a sewer system is not available and will not be available in the foreseeable future. The reasons that I make this statement is that I am satisfied by the proofs that as far as sewage supply is concerned and I'm talking about supplied on a municipal basis as dis-

tinguished from a private or individual basis, that despite the zoning in this particular area, this area is going very, very slowly. This is one of the reasons that I do not accept the arguments by plaintiff's counsel that the development of this area has been inhibited by the zoning therein. I do not think that this is true because I do not feel that the proofs support it. The testimony before me is to the effect that there are, if I recall correctly, 47 homes within this 2400 acre tract of land in northern Montville. This goes back to the early 1950's as far as I can recall. So that if there is any deterrents as far as development is concerned, I do not feel it has been because of municipal zoning. I feel that it has been because of the natural environment, the natural detriments as far as the land itself is concerned.

As far as the soil is concerned there is a great deal, as I've already said, that it consists of a great deal of Precambrian gneiss which is a highly impermeable soil. As I've already indicated there are outcroppings that make development, very, very difficult. I think that as long as I am talking about sewage disposal facilities, I have a lot of trouble on both sides as far as this case is concerned. I feel that septic systems and I'm satsified, and the reason for the statement is based on the proofs, I feel that septic systems in this area are very, very difficult. I am satisfied that a septic system may not constitute the best mode of sewage disposal. By the same token, with reference to this area, I am not at all convinced that the answer is with respect to a package type. I am satisfied with Mayor Eckhardt's testimony in this regard of the problems that Montville has had as far as package sewer plants are concerned. As far as the Monna tract is concerned, even though I don't feel that this is important I do mention it solely as an indication of credibility as far as Mr. Jeske is concerned, I do not feel that his proposal is a satisfactory solution either. The reason for this is that I am satisfied from the proofs

offered on behalf of the defendant Intervenor and particularly, Mrs. Connolly, the testimony supplied and the evidence supplied me by way of the natural resources inventory that, and I'll just use this as an illustration of what I'm talking about, that a stream does flow through this area where the proposed spray irrigation field is intended to be situated. Now, of course, this is my own reaction and this is one of the reasons I say when it comes to sewage disposal I have a great number of problems. I think that the governing body in Montville had good reason to be concerned. I am not convinced that the septic system is the best mode but it would seem to me, given a choice between septic system in a low density zoning, based on what is before me, may be far more reasonable than package sewer plants within the same area. Again, I emphasize the only reason for this review as far as the subdivision proposal is concerned is to illustrate some of the reasons I've reached, the conclusions that I have reached.

Testimony was also presented to me by a Mr. Aurnhammer with reference to the cost of development either on a 3 acre or by the cluster modification within the zoning ordinance. Again, I would be less than candid if I did not express a certain amount of dissatisfaction with the figures as expressed by Mr. Aurnhammer. The reason I express this dissatisfaction is, he very candidly, and I respect him for his admitting that these 2 proposals were just two of an infinite number of modes of subdivision. I am left in a quandry as to whether or not the cost of development would really be as Mr. Aurnhammer testified. I also have the testimony of Mr. John O. Lasser. I was very much impressed by his testimony because I felt that he tried to give a very fair presentation but again, it had a basic weakness in that he candidly admitted that he had to rely on some of the figures supplied by Mr. Aurnhammer. I think at this juncture it would be appropriate also

to go into the 2 planners that were offered in this case, Mr. Pete Abeles and Mr. O'Grady. I had a lot of trouble with some of the concepts as proposed by Mr. Abeles. For example, initially I was left with the impression that he was testifying that water availability and sewer disposal availability are not acceptable bases for zoning and should not be considered except in an ancillary manner, it should not be taken into consideration in zoning. Later on in cross examination he modified that. He said yes, they are principals that should be considered but they are ancillary in nature.

I feel that water and sewage disposal availability are facts to be considered along with many other factors in determining the propriety of certain zoning. Neither of these two elements are the alpha and the omega but they compose factors to be considered along with all other factors. I had a lot of trouble with Mr. Abeles' testimony in the respect that I don't think that he was truly familiar with the whole 2400 acres. He may have had some knowledge with reference to the 380 plus acres that we have been calling the Monna tract but I think that his information was limited to that. For example, he had no idea where the nearest fire department was. He had no idea where the nearest school was and I even had reason to question his accuracy or at least there was some question in my mind as to his accuracy as to how close the Monna tract was to 202, for example, what the driving time was. So that as far as Mr. Abeles' testimony is concerned I gave it little weight because as we instruct jurors, the testimony of experts are offered for your guidance. You are not bound by the expert's testimony except insofar as you feel that the premises upon which that opinion is based or premises upon which those opinions are based have a strong foundation. The opinion is no stronger than the foundation upon which it was laid and I was not satisfied

with the foundation as far as Mr. Abeles is concerned. Certain of these witnesses I'm g .g to admit such as Mrs. Winder because again, this was foundation for the offering of the proofs.

I think that as far as the environmentalists are concerned I can pretty well cover that with a broad brush but by doing so I do not mean to deprecate environmental impact. Again, I feel that this is a factor to be considered with other factors in determining zoning. I think that this is presently accepted but again, environmental impact is not the beginning and the end and one of my problems generally and again, I'm using this in a general sense, with environmentalists' testimony is that if you follow it right to the letter and to its logical conclusion, all development would cease. This just is not feasible. It is not practical, it is not reasonable. I feel that the environmental impact is a factor to be considered along with many other factors in determining the propriety of zoning, whether it should be high density or low density as indicated herein. For this reason I don't intend to spend a great deal of time with a good part of the testimony that was presented to me except for Mr. O'Grady. I think that basically I've already covered Mayor Eckhardt. His testimony was pretty much in accord with that of Mr. Genoble, a councilman on the body. Mr. Woodbridge again, was foundation as was Mrs. Kennedy's testimony. As far as Mr. Iivari is concerned he offered support to low density zoning in this area as did Mr. Miller, the State geologist. As far as Mr. Iivari is concerned I felt that when it came to spray irrigation, Mr. Jeski was way ahead of him but that is collateral to the issue before me. He testified that it should have—that based on geology that this should be on the basis of a minimum of one and a half acres. His information and his testimony was based on information gleaned from the soil maps. Mr. John Densey again testi-

fied with reference to various factors. As far as his testimony is concerned with reference to the impact from erosion, siltation, etc., while informational, as far as I'm concerned was not sufficient to show the cause of the same. However, I was satisfied with his testimony with respect to the measurements at the various posts through the areas that were set up to measure the route of water flow and to that extent I think that his testimony was beneficial. As far as Mr. Roginski is concerned, he was one of the "environmentalists" that I lumped all together as was Mr. Smith, the ecologist who testified with the impact as far as woodlands are concerned. I found this very, very interesting, very, very beneficial and I think that again, the testimony of these various environmentalists should be and I gather have been taken into consideration with respect to zoning and I emphasize, because I passed this over very, very quickly, I do not, in any sense of the word, deprecate them. Not at all because what they have to offer by way of the effect of, for example, woodlands, as far as the absorbtions of polluting gases, etc., is a factor to be considered with all other factors as far as zoning is concerned.

As far as Mr. O'Grady is concerned, part of his testimony I found very helpful, part of it not so helpful. The part that I found helpful was, in particular, the background. I'm satisfied that he is thoroughly familiar with Montville and the problems that Montville has as far as zoning is concerned. I am convinced that he is familiar and took into consideration in making his recommendations the impact that, for example, the expansion of the sewer system would have on the municipality, the expansion of the water supply system. Again, I feel that these are factors properly considered as far as zoning is concerned because if you zone for high density the municipality is required to supply these facilities and I think that in

zoning properly it's a factor to determine whether or not the expansion of such facilities will cause a financial burden upon the citizenry to the particular municipality. Again, it is a factor to be considered with all other factors.

As far as my acceptance of testimony or my findings of facts with respect to accessibility, I relied a great deal on Mr. O'Grady and I accepted his testimony in that regard. I accepted his testimony with respect to the purposes for which this was increased from a 1 acre to a 3 acre zone. I had a lot of problems as far as his testimony with respect to feasibility of development. I want to make it perfectly clear that this was a bold statement, a bold conclusionary statement and I do not accept his testimony as to the feasibility of development. As far as this zoning is concerned, and I'm going to break it down into two steps, one, the whole 2400 acres and then as far as the plaintiff is concerned, the plaintiff's 386 acres. As far as the 2400 acres is concerned, I'm satisfied that the 3 acre zoning is appropriate. I'm satisfied from the proofs that there is a great deal of land in southern and central Montville that can still be developed. A municipality is not required to develop everything at one time. This would be completely contrary to a comprehensive plan. A municipality has a right to control, to reasonably control development. In making this statement I am fully cognizant of the fact that once you have 3 acre zoning and it is developed it makes it very, very difficult to change. Not to change the undeveloped portion but to change that which has been developed. Again, under the circumstances herein, I think that the municipality had a right to take into consideration in considering this zoning the slow growth in this area. I think that this was a valid consideration as far as a comprehensive zoning plan is concerned; that expansion within southern Montville, in particular, but also including central Montville, as far as development is concerned at

this particular juncture is far more reasonable, is far more reasonable both from a land standpoint, from a municipal standpoint as far as providing services and utilities and from a landowners standpoint. I think that the municipality properly took into consideration these natural detriments as I have called them of this area because I am fully satisfied that no matter how you zone this there are large areas that are not going to be developable because of the steep slopes, because of the wetlands, because of many factors. I am satisfied that in certain areas, for example, and I'll just use this again by way of illustration, that it will be difficult, if not impossible, to get a successful percolation test for a septic system. Therefore, many, many factors that go into my conclusion that the 3 acre zoning as it presently exists is not reasonable. There was a reasonable basis upon which to zone this 3 acres, however, I do have a lot of problems with the cluster concept in this case.

What I'm about to do may seem to be a surprise to some. I feel, I find and I conclude that the cluster concept in this zoning ordinance is like carrying coals to Newcastle. It leaves the property owner with nothing and what bothers me, in particular, is that the three uses to which the land may be dedicated must be developable for all of those purposes as I read it. Now, if a landowner cannot build a house on a piece of land because of the steepness of the slope, how in the world can you expect to build a school and that bothers me. I think it has a right to bother me. The recreational purposes, I wonder about. As far as the concept is concerned, clustering is a valid concept as was recognized by Judge Furman in *Chrinko Crane Co. v. South Brunswick Twp. Planning Board,* 77 N.J. Super. 594 and in that case and this is one of the reasons I concluded and I agree with Judge Furman, he says: "The need for preserving woods and park-

lands in a natural state as well as land adequate for other public purposes is widely recognized." He then goes on to conclude that the cluster or open space zoning ordinance of South Montville Township was valid because it did comply with the purposes of zoning, that is it did go to density. So cluster zoning is a valid type of zoning. However, just like any zoning it must be reasonable and in this particular case I feel that it is not reasonable.

As far as the 2400 acres is concerned I am going to declare the zoning ordinance invalid because I feel that the cluster aspect so tied in with the 3 acre zoning and in order to give reasonable use to the property owner cluster zoning is appropriate, however, I am going to give the municipality an opportunity in which to correct what I see is a deficiency, so that if a cluster concept within the confines of this opinion can be adopted the zoning will not be invalid but will be valid. As I think I've indicated but in the event I have not, I just feel that the cluster aspect of this ordinance is not severable from the other part of the ordinance.

The municipality will have 90 days in which to develop an amended ordinance as far as the cluster is concerned. I think that I have pointed out that as far as I'm concerned and while initially I had some doubts with reference to the dedication for specific purposes contained herein, I want to say just so that there is no misconception, those doubts are no longer with me because of the *Chrinko* case and because of the *Nelson against South Brunswick Twp. Planning Board,* 84 N.J. Super. 265, an Appellate Division case cited in which Chrinko was cited with approval. Just so that you have the benefit of my erroneous thinking, I felt that the statute limited dedication of land for the purposes of school and playgrounds, etc. However, as a result of reading these two cases, I have serious doubts as

to the propriety of that thinking so that my concern is not for the purposes at this juncture but for the purpose the limitations placed upon it. Now, just again so I make it perfectly clear, I think that the governing body has a right to discretion within the planning board but not to tie them in so that there cannot be reasonable cluster development as a reasonable alternative because the affects of this ordinance was to leave the developer with no alternative. That's why I have ruled the way that I have. I think that the only way the cluster zoning can be validly enacted is if there is a reasonable alternative. That is, the purposes as set forth in *Chrinko* are complied with. I said that I would talk about this in 2 aspects because the pretrial raises it. One is an attack as far as the 2400 acres is concerned and I feel that the proofs are clearly inadequate except as what I've set forth. As far as the plaintiff's property is concerned I come to the same conclusions that I have reached as far as the general zoning is concerned, that it is reasonable provided a reasonable alternative by way of cluster zoning is enacted if, in fact, it is enacted. I feel that insofar as the plaintiff's land is concerned that it may well be for the Planning Board to decide whether or not it should be developed in accordance with the cluster zoning and I'm talking now, specifically, about water supply and sewage disposal. That I don't think you take care of by zoning.

Mr. Eismeier, may I request that you submit an appropriate order declaring that the ordinance is invalid for the reasons set forth by the Court and giving the municipality 90 days within which to amend the cluster aspect of the zoning ordinance. The Court will retain jurisdiction. Do it pursuant to the 5 day rule. Any reason why the order can't be on my desk by next Friday?

MR. EISMEIER: No, that is fine.

THE COURT: All right. Do it pursuant to the 5 day rule. If I don't have it on my desk I'll expect to see you gentlemen on January 30th at 9 A.M. Are there any questions so that we can clear it up now and not have to raise them later, Mr. Brach?

MR. BRACH: There is, of course, a second part of the trial.

THE COURT: I'm fully cognizant of that and I am not going to stay the second part of the trial. I'm going to go ahead with it as though I had not disposed of this aspect of it. My inclination, at this junction, is to go ahead with it because as we discussed off the record we're going to get into the Mount Laurel aspect and while the two are related there is enough dissimilarity between these two aspects that I feel that there's no good reason why I should stay it. Does anyone want to be heard with respect to that, Mr. Eismeier?

MR. EISMEIER: Yes, your Honor. There will be no objections raised by me to going into phase two and I would suggest that the best method to bring those before the Court would be for me to bring a motion to dismiss phase two because I would like to be heard on that. There are several legal issues and I would like to raise them.

THE COURT: I anticipated this. We'll set a trial date.

MR. BRACH: If the Court please, if there's going to be some question and I'm aware of the nature of the questions that will probably be raised from Mr. Eismeier, I would suggest to the Court that there ought to be, perhaps Mr. Eismeier can indicate how quickly those can be brought forth because there would be no real point, if the Court decides adversely to us those questions, for us to go into extensive preparation of a trial that wouldn't be forthcoming.

THE COURT: Mr. Brach, it would seem to me if I give you a trial date right here and now that the same considerations that you are arguing to me also pertain to the municipality. I'm sure the municipality doesn't want to spend money unnecessarily.

Let me put it this way; setting a trial date will act as a prod because I think you gentlemen know that when it comes to a trial date adjournments are very, very difficult to come by and if there would be a tendency to procrastinate, hopefully with a trial date that tendency will be dispelled. Do I make myself clear? In other words, what I'm suggesting to you, Mr. Brach, I don't think I have the right or the power to say, Mr. Eismeier, make your motion on such and such a date, otherwise I won't entertain it. I'm suggesting to him in as strong terms as I can that he'd better get it on because I'm not going to put it off in the event you're unsuccessful. I think the message came through loud and clear.

MR. EISMEIER: Message received.

THE COURT: March 23rd, gentlemen, 9 A.M. As a result of the off the record discussion with counsel it has been agreed that all exhibits will remain in the custody of the Court. If any counsel desires any of the exhibits they will be released to that attorney but only upon the signing of a written receipt. This is the only way we can keep track of where the exhibits are and I think it's unnecessary to say if an attorney signs out for an exhibit he will be responsible to see that that exhibit is returned.

Gentlemen, if you want exhibits please see Mrs. Vienna. I'd like to centralize it with her rather than have my law clerk or my secretary get involved.

Before we adjourn, gentlemen, I do want to say one thing to all of you. I want to thank you for the good job

you did on the briefs, for the good job that you did on your written summations. They helped me immeasurably. They made a long task so much shorter, although not a great deal shorter, but I do want to thank all of you for a job well done. It is appreciated.

We'll recess now.

ON PETITION FOR CERTIFICATION
(Filed May 1, 1979)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 1st day of May, 1979.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk

ORDER
(Filed February 25, 1976)

This matter having come on for trial before the Honorable Jacques H. Gascoyne, in the presence of Brach, Eichler, Rosenberg & Silver, Esqs., Attorneys for the Plaintiffs, William L. Brach, Esq., appearing, and Young and Sears, Esqs., Attorneys for the Defendants Mayor and Township Committee of the Township of Montville, Lawrence K. Eismeier, Esq., appearing, and McCarter & English, Esqs., Attorneys for the Defendant-Intervenor Committee to Preserve Northern Montville, Nicholas C. English, Esq., appearing, and the Court having considered the testimony, exhibits, and the argument of counsel and being of the opinion that the provisions for three acre minimum lot size in the zoning amendment of July, 1974 are valid, that said amendment is invalid because the cluster provisions contained in said amendment are unreasonable, that the zoning amendment will be valid if the cluster provisions are corrected, and that the Township could have the opportunity to correct the deficiencies in said cluster provisions, and the Court having rendered an oral opinion which is to be incorporated herein, and the respective counsel having appeared on argument as to the form of Order, and further having appeared on the motion of Plaintiffs for reconsideration of the Order herein as to the zoning amendment as aforesaid, and the motion of the Municipal Defendant to dismiss the second phase of this action relating to comprehensive zoning and the Mt. Laurel considerations, as more particularly set forth in the Pretrial Order of the Court on the grounds that the Plaintiffs lack standing, and the Court being of the opinion that an Order should be entered as follows:

IT IS, on this 25th day of February, 1976, ORDERED and ADJUDGED, that the zoning amendment of July,

1974 is invalid because the provisions for cluster zoning contained therein are unreasonable; and it is further

ORDERED and ADJUDGED, that said ordinance amendment will be invalid if the aforesaid cluster provisions are corrected in accordance with the Court's opinion, and the Township shall have 90 days from the date hereof to amend said cluster provisions; and it is further

ORDERED and ADJUDGED that the motion of the Plaintiffs for reargument is hereby denied; and it is further

ORDERED and ADJUDGED that the motion of the Municipal Defendant for dismissal on the grounds that Plaintiffs lack standing to pursue Phase II be and the same is hereby denied; and it is further

ORDERED and ADJUDGED that to the extent that there remain issues as to the validity of the A-1 zone not disposed of herein, the Court shall reserve the right to supplement this opinion at such time as the transcript of the trial shall be available to it; by counsel and it is further

ORDERED and ADJUDGED that this shall constitute an interlocutory determination and that this matter shall proceed to final disposition on Phase II pursuant to the direction of this Court; and it is further

ORDERED and ADJUDGED that the oral opinion of the Court rendered on January 9, 1976 is incorporated in this Order as if set forth at length herein.

/s/ Jacques H. Gascoyne
JACQUES H. GASCOYNE,
J.C.C. T/A

JUDGMENT
(Filed May 10, 1976)

This matter having coming on for trial before the Court sitting without a jury on April 13, 1976 on the Second Phase of this matter as bifurcated pursuant to the Pretrial Order of this Court; and the plaintiff having proceeded on its proofs and there being represented to the Court that there would be no further proofs by the defendant controverting the allegation that the Township of Montville is a developing municipality as that term is utilized in *Southern Burlington County N.A.A.C.P., et al. v. Twp. of Mt. Laurel*, 67 N.J. 151; and

The Court having determined that by reason of the foregoing that the Township of Montville must comply with the provisions of the *Mt. Laurel* opinion and must provide for its fair share of a variety of types of housing for a region; and

The Court having further determined based upon the proofs in Phase I that the provisions of the Zoning Ordinance of the Township of Montville establishing minimum floor area requirements for single-family residential dwellings in the respective zones bear no relationship to health and safety requirements and should also be reconsidered by the Township.

It is, on this 10th day of May, 1976, ORDERED that judgment be entered in favor of the plaintiff on its Count Three; and it is further

ORDERED that this matter shall be remanded to the Township of Montville and that the Township shall complete the Master Plan Study now underway and enact implementing zoning ordinances no later than January 31, 1977, said time to be extended only upon good cause shown; and it is further

ORDERED that the Township shall consider and enact the necessary zoning to comply with the *Mt. Laurel* decision and the obligation set forth in that decision to bear the Township's fair share of varied housing in a region; and it is further

ORDERED that said zoning ordinance provisions relating to minimum floor area requirements in the residential districts, are held to be invalid since they do not bear a legitimate relationship to health and safety requirements; and it is further

ORDERED that the Court shall not retain jurisdiction over this matter; and it is further

ORDERED that the Order entered on February 25, 1976 on Phase I of this cause shall now become final; and it is further

ORDERED that the oral opinion of the Court rendered on April 14, 1976 is incorporated in this Judgment as if set forth at length herein.

/s/ Jacques H. Gascoyne
JACQUES H. GASCOYNE,
J.C.C. T/A